July 27, 2018

The Honorable Senator Warren
United States Senate
Washington, DC 20510

Dear Senator Warren:

On behalf of the American Bar Association and its over 400,000 members nationwide, I write to express our support for your proposed amendment No. 3659 to H.R. 6147, which would prohibit the use of funds by the Office of Personnel Management or any other executive branch agency for the development, promulgation, modification, or implementation of the July 10, 2018, Executive Order (EO) or any EO, rule, or guidance that would remove Administrative Law Judges from the Competitive Service.

The July 10th EO is an ill-considered and legally vulnerable response to the Supreme Court ruling in *Lucia v. Securities and Exchange Commission*, which held that SEC Administrative Law Judges (ALJs) are considered “inferior officers of the United States” and therefore require appointment consistent with the Appointments Clause of the U.S. Constitution.

The EO, which eliminates the nationwide, uniform, competitive selection exam process and weakens existing qualifications standards, gives each agency head the unfettered authority to hire ALJs based on criteria established by the agency. In fact, the EO specifically states that it gives agencies greater discretion to assess critical qualities, including the applicant’s “ability to meet the particular needs of the agency,” which are, of course, left entirely to the agency to define.

There is no doubt that changes to the current selection and appointment process for ALJs are required by *Lucia*, but we believe that those changes should be instituted after there has been an opportunity for Congress and the public to engage in an open and deliberative process that considers possible options for curing the constitutional defects in the current system. We would expect this to include an examination of ways to assure that safeguards remain in place that respect the unique adjudicative role of ALJs and retain public confidence in the system. If adopted, your amendment would allow congressional and public engagement on this important issue.

A fair and impartial administrative judiciary is indispensable to our system of justice. Vast numbers of Americans are involved in administrative adjudicative proceedings
every day, and the decisions rendered by ALJs in these proceedings often affect their lives in profound ways.

By giving agency heads sole discretion to hire ALJs who will be making determinations affirming or overturning decisions rendered by that agency, the EO has the potential to politicize the appointment process and interfere with the decisional independence of ALJs.

Nothing less than the integrity of the administrative judiciary is at issue here. That is why it is critical that Members of Congress have an opportunity to participate in the debate and help formulate a solution. The first step is to halt implementation of the EO.

We commend you for your leadership on this vital issue.

Sincerely,

Hilarie Bass